Supreme Court, U.S.
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NO. 03-182

IN THE

Supreme Court of the United States

SHALER AREA EDUCATION ASSOCIATION,

Petitioner,

V.

F. NAYLOR EMORY; DENNIS A. ERB;
ROBERT K. GILBERT; JAMES W. LOSSELL;
BARBARA J. MCALLEY; AND WESLEY S. SEMPLE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. In *Chicago Teachers Union v. Hudson*, this Court held "that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee," and that the "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. 292, 307 n.18, 310 (1986). Do these holdings require all local unions that force nonmembers to subsidize union activities to provide nonmembers with independently audited financial disclosures?

II. If the answer to Question I is "no," can small local unions satisfy the First Amendment procedural safeguards *Hudson* requires by merely providing nonmembers with an unverified statement of the union's chargeable and non-chargeable expenditures and an invitation for the nonmembers to inspect the union's ledger of expenses?

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

COUNTER-STATEMENT OF THE CASE 1

RESPONSE TO PETITION 2

CONCLUSION 8

APPENDICES

A. Fourteenth Amendment to the United States Constitution 1a

B. Civil Rights Act of 1871, 42 U.S.C. § 1983 ..... 2a

C. Pennsylvania Fair Share Act, 71 Pa. Stat. §§ 575 (a);(b);(c) (1990) .. 3a

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 7

Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987) 4

Andrews v. Education Ass'n of Cheshire, 653 F. Supp. 1373 (D. Conn.), *aff'd*, 829 F.2d 335 (2d Cir. 1987) 4

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) . . . . . *passim*

Harik v. California Teachers Ass'n, 326 F.3d 1042 (9th Cir.), *petition for cert. filed sub nom. Sheffield v. Aceves*, 72 U.S.L.W. 3105 (July 11, 2003) (No. 03-89) . . . . . *passim*

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) . . 5

Otto v. Pennsylvania State Educ. Ass'n-NEA, 330 F.2d 125 (3d Cir.), *petition for cert. filed sub nom. Shaler Area Educ. Ass'n v. Emory*, 72 U.S.L.W. 3129 (Aug. 01, 2003) (No. 03-182) . . . . . *passim*

Prescott v. County of El Dorado, 915 F. Supp. 1080 (E.D. Cal. 1996), *rev'd in pertinent part*, 177 F.3d 1102 (9th Cir. 1999), *vacated* 528 U.S. 1111, *reinstated in pertinent part*, 204 F.3d 984 (9th Cir. 2000) 4

TABLE OF AUTHORITIES–cont.

Page

CASES

Sheffield v. Aceves, No. 03-89 (U.S. docketed July 16, 2003) ..... *passim*

Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987) 5

Wareham Educ. Ass'n v. Labor Relations Comm'n, 713 N.E.2d 363 (Mass. 1999) 4

Whitley County Teachers Ass'n v. Bauer, 718 N.E.2d 1181 (Ind. Ct. App. 1999) 4

CONSTITUTIONS, STATUTES, AND RULES

United States Constitution,
amend. I ..... i, 6
amend. XIV 1

Civil Rights Act of 1871,
42 U.S.C. § 1983 (West Supp. 2000) 1

Pennsylvania Fair Share Act,
71 Pa. Stat. § 575 1

Supreme Court Rules
10 3
10(a) 3
10(c) 3
15 1
24 6

Pursuant to Supreme Court Rule 15, Respondents F. Naylor Emory, Dennis A. Erb, Robert K. Gilbert, James W. Lossell, Barbara J. McAlley, and Wesley S. Semple ("Teachers") file this brief in response to the petition for writ of certiorari filed by the Shaler Area Education Association ("SAEA").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the constitutional provision set out in the Petition ("Pet.") at 2, this case involves the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 (West Supp. 2000), and the Pennsylvania Fair Share Act, 71 Pa. Stat. § 575. Their pertinent texts are set forth in Appendices ("App.") A at 1a, B at 2a, and C at 3a, respectively.

COUNTER-STATEMENT OF THE CASE

The Teachers do not dispute the facts stated in the Petition's Statement of the Case, (Pet. at 2-5). However, they do disagree with the characterizations and legal conclusions intertwined in that Statement. Moreover, the Statement fails to present all facts material to consideration of the questions presented. The relevant facts omitted from the Statement are presented below.

SAEA's volunteer officers receive an honorarium for their Association work, consisting of 34% of SAEA's annual expenditures. Pet. App. E at 80a (Stipulated Facts). SAEA's unaudited and unverified statement of its prior-year expenditures, broken down into chargeable and non-chargeable categories, is prepared by the SAEA treasurer. *Id.* The Teachers' agency fee, which is based on this

unaudited and unverified calculation, was 90% of full union dues. *Id.* at 77a-78a, 80a-81a; *accord* Pet. App. D at 57a, 63a.

The "invitation to SAEA feepayers to inspect SAEA's ledger of prior-year expenditures on which its fee calculation is based," Pet. at 4, was not made in any of the *Hudson* notices sent during the school years at issue (1994-95 and 1995-96), nor is such an "invitation" in the record. Instead, SAEA represented in the Stipulation of Facts that "beginning with the 1997-98 school year," such an "invitation" would appear in the *Hudson* notice. Pet. App. E at 82a.

RESPONSE TO PETITION

In decisions only weeks apart, the Ninth Circuit in *Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1047-49 (9th Cir.), *petition for cert. filed sub nom. Sheffield v. Aceves*, 72 U.S.L.W. 3105 (July 11, 2003) (No. 03-89), and the Third Circuit in the instant case, *Otto v. Pennsylvania State Education Ass'n-NEA*, 330 F.3d 125, 131-33 (3d Cir.), *petition for cert. filed sub nom. Shaler Area Education Ass'n v. Emory*, 72 U.S.L.W. 3129 (Aug. 01, 2003) (No. 03-182) (Pet. App. A), came to diametrically opposite answers to the questions presented here. *See* Pet. at 5-7, 10-12. Moreover, in its revised opinion, the Third Circuit analyzed and rejected the *Harik* decision. Pet. App. A at 8a-11a.

For the reasons stated in the petition for writ of certiorari and petitioners' reply brief in *Sheffield*, No. 03-89 (filed July 11 & Sept. 25, 2003, respectively), the Teachers agree that the Petition's first question here raises a timely and substantial issue worthy of this Court granting the

petitions in both cases. Together, the first question presented here and the second question presented in *Sheffield* satisfy Supreme Court Rule 10(a) and (c).[1]

Although the Teachers do not object to certiorari being granted on the second question presented in the Petition should certiorari be granted on the first question, the second question does not independently meet the criteria Supreme Court Rule 10 establishes for granting review. There is no conflict among the courts of appeals on the latter question.

Admittedly, the Ninth Circuit–in conflict with the Third Circuit–held that small local unions do not have to conduct formal audits. *Compare Harik*, 326 F.3d at 1047-49 *with Otto*, 330 F.3d at 131-33 (Pet. App. A at 7a-11a). However, both circuits agree that merely inviting non-members to inspect the local union's ledger–as SAEA's second question posits–does not meet *Hudson*'s constitutional requirements:

> [T]he checkbook and canceled checks to which the union provides access are only part of the information required to verify the financial statements; the unions do not provide feepayers access to other financial records, such as bills or inventories. The small local union's practice does not meet the requirement of *Hudson* * * * to provide its feepayers with either the full financial material

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[1] Were there not a split in the circuits, the Teachers would oppose this Petition, because the Third Circuit's decision did **not** "decide[] an important federal question in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c). Only the Ninth Circuit's decision, subject to the *Sheffield* petition, conflicts with this Court's decisions.

> necessary to verify, or an independently sanctioned verification of, the local union's chargeable and non-chargeable expenditures.

Harik, 326 F.3d at 1049.[2]

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[2] Only the Indiana Court of Appeals appears to allow a small local union to meet *Hudson*'s audit requirement merely by inviting nonmembers to inspect its ledger. *See Whitley County Teachers Ass'n v. Bauer*, 718 N.E.2d 1181, 1191-92 (Ind. Ct. App. 1999). In contrast, Massachusetts' highest court, like the Third Circuit in this case, held that "there is no exception to *Hudson*'s audit requirement for small local union affiliates." *Wareham Educ. Ass'n v. Labor Rel. Comm'n*, 713 N.E.2d 363, 367-68 (Mass. 1999).

Moreover, the Indiana Court of Appeals based its ruling on two federal district court decisions that already had been reversed or called into question by the respective court of appeals, and failed to mention or discuss the courts of appeals' actions. *See Bauer*, 718 N.E.2d at 1192 (citing *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1090 (E.D. Cal. 1996), *rev'd in pertinent part*, 177 F.3d 1102, 1106 (9th Cir. 1999 , *vacated* 528 U.S. 1111, *reinstated in pertinent part,* 204 F.3d 984 (9th Cir. 2000)); and *Andrews v. Education Ass'n of Cheshire*, 653 F. Supp. 1373, 1377 (D. Conn.), *aff'd on other grounds*, 829 F.2d 335, 340 n.2 (2d Cir. 1987)). In *Andrews*, the Second Circuit did not decide whether the district court correctly suggested that a small local "might not require an independent auditor," because "the three interlocking organizations in this case do not fall into that category." 829 F.2d at 340 n.2. Like the three interlocking organizations in this case, the three interlocking organizations in *Andrews* were the National Education Association, its state affiliate and a local affiliate. *Compare Andrews*, 829 F.2d at 337 *with Otto*, 330 F.3d at 128-29, 131 n.6 (Pet. App. A at 3a-4a, 9a-10a n.6).

The Teachers object to the unions' assertions concerning the responses that the other affiliated locals of the Pennsylvania State Education Association had during the 2002-03 school year to the injunction, affirmed by the Third Circuit, prohibiting SAEA from collecting fees from the Teachers without providing an independent verification of SAEA's calculation of its fees. *See* Pet. at 8. The "facts" alleged are not matters of record.

In any event, the choice to forego both the audit and the collection of fees is a choice of the unions' own making.[3] As the Third Circuit aptly noted:

> [L]ocal unions are not without options. For example, unions without the financial wherewithal to afford the *Hudson*-required audit might choose to enter into combinations with other small unions to achieve necessary economics of scale. In the alternative, state or national unions might choose to subsidize the cost of local unions' audits.

Otto, 330 F.3d at 135 (Pet. App. A at 15a). The Third Circuit's alternative follows directly from this Court's approval of charging nonmembers for affiliate costs spent on other bargaining units: "The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable **economic**, political, and informational resources **when the local is in need of them.**" *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991) (emphasis added).

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[3] "Indeed, the union triggers no disclosure [or audit] requirement until it voluntarily seeks to collect service fees from the non-union members." *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 n.2 (6th Cir. 1987).

Obviously, the Teachers dispute the Petition's arguments on the merits, (Pet. at 15-20). However, because the Teachers agree that certiorari should be granted, they do not here respond in full to those arguments, without waiving their right to respond if certiorari is granted, *see* Sup. Ct. R. 24.[4] We do note that the Third Circuit ably and adequately justified requiring local unions to audit their fee calculations and rejected the Ninth Circuit's approach to this issue:

> [T]he Ninth Circuit shifted the burden of expense verification from the union to the nonmember. * * *
>
> *Harik* acknowledges that "union costs [for verification] do not trump non-members' First Amendment rights," *id.* [326 F.3d at 1049], and thus presumably there is no bye from *Hudson*'s requirement of independent auditor verification. But * * * *Harik* (as already noted) allows the option of providing financial reports (unaudited and, it appears, lacking any independent auditor oversight).* * * In so doing, *Harik* excises "independent auditor" from *Hudson*'s "verification by an independent auditor," 475 U.S. at 307 n.18, at least "[f]or the smallest [union] affiliates." *Harik*, 326 F.3d [at] 1048-49. * * *
>
> * * * We are bound by the Supreme Court's decision in *Hudson*, and its directive of "verification by an independent auditor" means just that.

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[4] The teachers in *Sheffield* (No. 03-89) responded to many of these same "merits" arguments in their reply brief filed on September 25, 2003. To the extent necessary, the Teachers here adopt the *Sheffield* reply.

> *Hudson* implied no intent to make the audit requirement depend on the size of the reporting union.

Otto, 330 F.3d at 131-32 (Pet. App. A at 9a-11a).

When the reason is that this Court has decided an issue, no additional "reasoned justification," Pet. at 15, is needed. When this Court's precedent directly applies, as it does here, that is sufficient reasoned justification. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The Court could, of course, defer consideration of the Petition in this case pending the disposition of the petition in *Sheffield*. However, there is an additional reason for considering both petitions together and granting certiorari in both cases at this time.

Although this case and the second question in *Sheffield* present the same legal question, the consequences of the unaudited local union disclosures on the nonmembers are not the same. In *Sheffield*, the local union's portion of the agency fee is based on the state union's chargeable percentage minus five percent, which is usually less than the chargeable percentage revealed in the local union's unaudited chargeable calculation. *Harik*, 326 F.3d at 1050. SAEA, however, does not use such a "local presumption." SAEA uses the 90% its treasurer calculates in his unverified chargeable statement of SAEA's expenses, not the lower chargeable percentage that the state union's audited statement approves. R. 19 (Amended Complaint, Exhibit A). Consequently, the effect of the local's unverified chargeable calculation is more severe on the Teachers here than on the teachers in *Sheffield*.

CONCLUSION

For the foregoing reasons, the Teachers agree that this Petition for Writ of Certiorari should be granted along with the similar petition on the same issue in *Sheffield* (No. 03-89) (Question II). Accordingly, the Court should conference the two cases together. The Teachers further suggest that, in the event certiorari is granted herein and in No. 03-89, the cases be consolidated for oral argument.[5] Alternatively, the Teachers suggest that the Third Circuit's decision should be summarily affirmed on the questions this Petition presents as consistent with this Court's decision in *Hudson*, and the Ninth Circuit's conflicting decision in *Sheffield* should be summarily reversed as contrary to *Hudson*.

Respectfully submitted,

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October 3, 2003

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[5]Counsel of record for the respondent Teachers here (No. 03-182) and the teacher petitioners in No. 03-89 is the same.